

NGUYEN (Migration) [2020] AATA 1052 (23 March 2020)

CORRIGENDUM

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr THANH DAN NGUYEN
VISA APPLICANT:	Mrs THI SEN DO
CASE NUMBER:	1730352
DIBP REFERENCE(S):	BCC2016/3492624
MEMBER:	Russell Matheson
DATE OF DECISION:	23 March 2020
DATE CORRIGENDUM SIGNED:	21 April 2020
PLACE OF DECISION:	Sydney
AMENDMENT:	The following corrections are made to the decision:

1. The words 'The Tribunal directs that information that would identify the applicant (including information about family, friends or associates) not be published (under s.378 of the *Migration Act 1958*). This means that if the decision is published, names and other identifying material must be removed from or modified in the published version of the decision' in the footnote on page 1 should be deleted.

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Russell Matheson
Member

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr THANH DAN NGUYEN

VISA APPLICANT: Mrs THI SEN DO

CASE NUMBER: 1730352

DIBP REFERENCE(S): BCC2016/3492624 OSF2016/038858

MEMBER: Russell Matheson

DATE: 23 March 2020

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309. 211, cl.309.212 and cl.309.213 of Schedule 2 to the Regulations; and
- cl.309.221 of Schedule 2 to the Regulations.
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Statement made on 23 March 2020 at 11:44am

6. CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) – Subclass 309 (Partner (Provisional)) – spouse – lawfully married in home country – financial, household and social aspects of relationship – nature of commitment – genuine and continuing relationship – decision under review remitted

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8. LEGISLATION

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Migration Act 1958 (Cth), ss 5F, 65

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Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cl 309.211(2), 309.212, 309.213, 309.221

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CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

13. This is an application for review of a decision made by a delegate of the Minister for Immigration on 8 November 2017 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
14. The visa applicant (the applicant) is a 44-year-old female national of Vietnam born in August 1975. She applied for the visa on 20 October 2016 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
15. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the delegate was not satisfied the applicant is the spouse of the sponsor.
16. The review applicant (the sponsor) appeared before the Tribunal on 17 March 2020 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant.
17. The review applicant was represented in relation to the review by his registered migration agent.
18. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

19. Background

20. The applicant is a 44-year-old female who resides in Ho Chi Minh City, Vietnam. She declares that she has no previous marriages or de facto relationships.
21. The sponsor is a 69-year-old Australian citizen who resides in Granville, Queensland. According to information provided with the visa application, he divorced his first wife in 1984. There is one child from this relationship. He married and divorced his second wife in 2004. There are two children from this relationship. He married for a third time and divorced his third wife in 2014. There are no children from this relationship.
22. The parties claim to have first met and became friends in 2005 while the sponsor, accompanied with a charity group, travelled to Vietnam. It is claimed that the applicant and sponsor maintained contact after the sponsor returned to Australia.
23. The sponsor travelled to Vietnam in 2007, 2008, 2009, 2010, 2011 and 2012. The sponsor spent most of his time in Vietnam each year.
24. The applicant claims the sponsor started living with her in Vietnam from 10 to 28 August 2013. The sponsor returned to Australia on 24 September 2013.
25. The sponsor travelled to Vietnam from 28 May to 30 September 2014.
26. It is claimed that the applicant and sponsor decided to marry on 5 October 2014.

27. On 5 October 2015, the sponsor travelled to Vietnam. The parties' engagement was held on 25 October 2015. The sponsor returned to Australia on 15 November 2015.
28. On 13 June 2016, the sponsor travelled to Vietnam. The applicant and sponsor signed marriage certificate on 11 July 2016. The sponsor returned to Australia on 12 September 2016 and this application was lodged on 20 October 2016.
29. The sponsor has travelled to Vietnam on three occasions to visit the applicant since their marriage for the period 1 February 2018 to 2 March 2018, 29 July 2018 to 5 September 2018 and 29 April 2019 to 22 May 2019.

CONSIDERATION OF CLAIMS AND EVIDENCE

30. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
31. The Tribunal has before it the Departmental file relating to the applicant; its own file; and a copy of the Department's decision provided by the sponsor to the Tribunal.
32. The evidence the parties provided at the Tribunal hearing is recorded throughout this decision record. _

Whether the parties are in a spouse or de facto relationship

33. Clauses 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
34. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

35. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant provided a copy of the marriage certificate registered in Vietnam indicating the parties were married in Ho chi Minh City, Vietnam, on 11 July 2016. There is no evidence before the Tribunal to indicate the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
36. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below, the Tribunal sets out its consideration of the evidence under the

relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.

37. The Tribunal had the benefit of the applicant's and the sponsor's oral evidence. The Tribunal gave all the evidence provided by the parties and the witness (the sponsor's mother) at the Tribunal hearing and the information contained in the Departmental and Tribunal files due regard. The Tribunal considered evidence given by the sponsor and the applicant to be persuasive and overall credible.

Are the other requirements for a spouse relationship met?

38. *Financial aspects*

39. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses and any combined future financial commitments or plans.
40. The applicant has provided copies of 26 money transfer receipts dated from June 2013 to October 2016. The applicant claims the money was utilised partly for charitable purposes, daily living expenses, household bills, care and support of her parents and for the purchase of property in Vietnam. The applicant provided a copy of land registration in her name for property purchased in Lam Dong, Da Lat. The parties informed the Tribunal the sponsor has recently sold the land for approximately AUD28, 500. The sponsor stated that the money he sent to the applicant was from his previous property settlement divorce from his previous wife and from his superannuation and his pension. The sponsor gave evidence that he also supports the applicant's parents financially. The sponsor also provided a copy of his will dated May 2018 indicating that he has left all his property and finances to the applicant.
41. The applicant and sponsor provided limited evidence regarding the financial aspects of their relationship, including evidence of any pooling of financial resources, sharing of day-to-day expenses or shared financial commitments for their life together as spouses.
42. The parties have no joint liabilities or major assets together. There is little evidence before the Tribunal to indicate that the parties share or pool their financial resources. There is no evidence before the Tribunal that one person in the relationship owes any legal obligation in respect of the other. There is little evidence before the Tribunal to support that the parties share day-to-day living expenses or pool their financial resources.
43. The Tribunal accepts there is a degree of difficulty in establishing and sharing financial resources when the sponsor and applicant live in separate countries. The Tribunal finds based on the evidence before it, that the sponsor has provided significant financial support to the applicant. The Tribunal places some positive weight on this aspect of the relationship.

44. *Nature of the household*

45. The Tribunal has considered the nature of the household including any joint responsibility for the care and support of children, if any, living arrangements of the parties and the sharing of the responsibility for housework.
46. The Tribunal accepts there is a degree of difficulty in establishing a joint household when the parties live in separate countries at the present time. The parties provided evidence of temporary household registration at the applicant's residential address in Vietnam from 27 June 2016 to 13 December 2016 and 2 August 2018 to 4 September 2018. The parties claim

to have lived together with the applicant's parents in Vietnam for approximately five months immediately after marrying in July 2016. The sponsor presented evidence of travelling to Vietnam on three occasions to visit the applicant since their marriage for the period 1 February 2018 to 2 March 2018, 29 July 2018 to 5 September 2018 and 29 April 2019 to 22 May 2019 cohabiting with the applicant and her parents.

47. The Tribunal accepts the sponsor resides at the applicant's home when visiting her in Vietnam. The parties stated that they share the responsibilities of the household equally. The parties provided broadly consistent and detailed oral evidence of their activities and living arrangements when together in Vietnam of the sharing of household duties and responsibilities.
48. Based on the evidence presented by the parties, the Tribunal accepts that they live together and have established a joint household together and that they share the responsibility for the housework when the sponsor visits the applicant in Vietnam. The Tribunal places limited weight on this aspect of the relationship.

49. Social aspects

50. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
51. The parties have provided a selection of photos taken of themselves, with Buddhist friends and the applicant's parents on different occasions in Vietnam. The photographs and their oral evidence indicate that the applicant and the sponsor have undertaken extensive joint social activities, have been in the company of each other's friends and have travelled extensively together. The Tribunal has given strong weight to the submitted photographs as evidence of the social aspects of the claimed relationship. The Tribunal accepts the parties' relationship is supported by the applicant's parents and friends. The sponsor gave evidence that his parents are deceased and he is distant from his three brothers in Vietnam having different views on life and they did not attend the couple's marriage. The parties provided a significant amount of additional photographs in regard to their social activities at the review hearing. The parties provided oral and documentary evidence of travelling internationally on religious pilgrimages before marriage as evidenced in their passport entry/exit stamps, to places such as Cambodia, Tibet and Thailand. They also stated that they had travelled to Singapore for a short holiday and domestically to places such as Tra Vinh, Ben Tre, Loc Ninh and other places in Vietnam. The parties provided documentary evidence of their travel. The sponsor has travelled to Vietnam on three occasions to visit the applicant since their marriage.
52. Overall, the Tribunal accepts the applicant and the sponsor plan and undertake social activities and travel together. The Tribunal is satisfied that the parties represent themselves to family, friends and other people as being in a marital relationship. The Tribunal is satisfied that family, friends and relatives view the relationship as a genuine and committed one.

53. Commitment

54. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.

55. The applicant and sponsor claim to have met each other in 2005 when the sponsor travelled to Vietnam on a charity and pilgrimage trip further stating that they began having a sexual relationship from 2012 and started living together in Vietnam in 2013. The parties were engaged in October 2015 and married in July 2016. They have provided a copy of the marriage certificate registered in Vietnam. The Tribunal accepts the parties are lawfully married and have been in a relationship for over seven years. The sponsor has visited the applicant several times during the time of the relationship cohabiting with the applicant and her parents at their family home in Vietnam.
56. The parties stated that they are practising Buddhists and they are focusing on personal spiritual development and the attainment of a deep insight into the true nature of life and feel they are connected to each other through Buddhism and are focused on spiritual healing and exercise and herbal medicine together. They further stated that together they have shared the same beliefs in helping the poor and disadvantaged in Vietnam. The applicant further stated that she wants study and to be accredited to work in aged care services in Australia. The Tribunal found the parties to be genuine.
57. The parties presented documentary evidence of continued daily contact during periods of separation and a sound knowledge of each other's lives, family, living arrangements, health issues, personal history and future together. The evidence of communication between the parties is significant and the Tribunal considers the parties' knowledge of one another and their everyday concerns is a function of this communication.
58. The Tribunal is satisfied that the parties see their relationship as stable, mutually supportive and a long-term one. The Tribunal considers their evidence with regard to their commitment to each other plausible, persuasive and genuine.
59. The Tribunal is satisfied the applicant and the sponsor have derived a degree of companionship and emotional support that is commensurate with a couple being in a genuine and continuing relationship. The Tribunal is satisfied the couple view their relationship as a long-term one.
60. The Tribunal is satisfied, having regard to the totality of the circumstances and the evidence provided that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is a genuine and continuing relationship and that they do not live separately and apart on a permanent basis.

61. Findings

62. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
63. Given these findings the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship. Therefore the visa applicant meets cl.309.211(2) and cl.309.221.
64. There is no evidence before the Tribunal that the spouse of the applicant is prohibited from being the sponsor of the applicant. The Tribunal is satisfied that the sponsor at the time of visa application was an Australian citizen who had turned 18. Therefore the applicant meets cl.309.212 and cl.309.213.
65. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

66. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211, cl.309.212 and cl.309.213 of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations.

Russell Matheson
Member

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ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).